

### Practice Notes

**Warning Against Filing or Proceeding with a Frivolous Appeal or Petition.** The court's early decision in *Asberry v. United States*, 692 F.2d 1378 (Fed. Cir. 1982), established the policy of enforcing this rule vigorously. Since then, many published opinions have included sanctions under the rule. Damages, double costs, and attorney fees, singly or in varying combinations, have been imposed on counsel, parties, and pro se petitioners for pursuing frivolous appeals.

**Challenging a Frivolous Appeal.** If an appellee or respondent considers an appeal or petition frivolous, the appellee or respondent must file a separate motion with that allegation. The assertion that an appeal is frivolous must be accompanied by citation to the opposing brief or the record below with clear argument as to why those citations establish that the appeal is frivolous. A party whose case has been challenged as frivolous is expected to respond or to request dismissal of the case.

#### Rule 39. Costs

(a) **Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise:

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) **Costs For and Against the United States.** Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) **Costs of Copies.** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) **Bill of Costs: Objections; Insertion in Mandate.**

- (1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.
- (2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.

#### Rule 39. Costs.

(a) **Notice of Entitlement to Costs.** When the clerk provides notice of judgment or order disposing of an appeal, the clerk must advise which party or parties are entitled to costs.

(b) **Bill of Costs; Copies; Objection.** A party must serve the bill of costs on the form prescribed by the court and must file an original and three copies with the court. An objection to a bill of costs must not exceed 5 pages and must be filed in an original and three copies and served on the other parties.

- (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must — upon the circuit clerk's request — add the statement of costs, or any amendment of it, to the mandate.
- (e) **Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:
- (1) the preparation and transmission of the record;
  - (2) the reporter's transcript, if needed to determine the appeal;
  - (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
  - (4) the fee for filing the notice of appeal.

### ***Practice Notes***

**Costs When the United States is a Party; Costs in Ex Parte Appeals from the Patent and Trademark Office.** 28 U.S.C. § 2412(a) authorizes costs to be taxed against the United States; thus, costs (as defined in 28 U.S.C. § 1920) may be awarded both for and against the United States in this court. An ex parte patent appeal under 35 U.S.C. § 141 and an ex parte trademark appeal under 15 U.S.C. § 1071 are not within the scope of 28 U.S.C. § 2412, however, and costs in these appeals are not awarded for or against the Patent and Trademark Office.

**Limit on Printing Costs.** The costs taxable under Federal Rule of Appellate Procedure 39 are limited to the costs of preparing typewritten briefs (even if a party elects to have a brief printed) and of copying briefs and appendices.

**Current Rates.** The following rates are the current maximum allowable costs:

\$6.00 per page for the table of page numbers of designated materials, the originals of briefs, and the table of contents for the appendix (whether printed, typewritten, or word processed);

\$0.08 per page for copying and collating; and

\$2.00 per copy for covers and binding.

**Allowable Costs.** Costs may be billed for 16 copies of briefs and appendices, plus 2 copies for each additional party, plus any copies required or allowed, e.g., confidential briefs or appendices. The cost of service copies of the table or physical compilation of the designated materials may also be billed. Any other cost billed must be separately justified. The total billed for any item must be limited to the lesser of actual or allowable costs. Actual cost of briefs and appendices prepared in-house includes word processing, copying, and binding, at the amount normally billed to a client for these services. The United States may assume its actual costs are the allowable costs. The costs of correcting a nonconforming brief are not taxable. Counsel are urged to stipulate to costs.

**Payment of Costs Taxed.** Pay the party or parties in whose favor costs are taxed by check sent to counsel for the party or to the party if the party appeared pro se. Do not involve the court in collection matters.